

**Updated Informative Digest for the State Board of Equalization's  
Adoption of Proposed Amendments to California Code of Regulations,  
Title 18, Section 4902, *Relief from Liability***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 4902, *Relief from Liability*, on April 22, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 4902 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on April 22, 2014, to comment on the proposed regulatory action. There have not been any changes to the applicable laws or the effect of, the objective of, and anticipated benefits from the adoption of the proposed amendments to Regulation 4902 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Current Law

The Board administers special taxes and fees under the Motor Vehicle Fuel Tax Law (RTC § 7301 et seq.), the Use Fuel Tax Law (RTC § 8601 et seq.), the Cigarette and Tobacco Products Tax Law (RTC § 30001 et seq.), the Alcoholic Beverage Tax Law (RTC § 32001 et seq.), the Energy Resources Surcharge Law (RTC § 40001 et seq.), the Emergency Telephone Users Surcharge Act (RTC § 41001 et seq.), the Hazardous Substances Tax Law (RTC § 43001 et seq.), the Integrated Waste Management Fee Law (RTC § 45001 et seq.), the Oil Spill Response, Prevention, and Administration Fees Law (RTC § 46001 et seq.), the Underground Storage Tank Maintenance Fee Law (RTC § 50101 et seq.), the Fee Collection Procedures Law (RTC § 55001 et seq.), and the Diesel Fuel Tax Law (RTC § 60001 et seq.) (hereafter, collectively referred to as special tax and fee laws). Each of the special tax and fee laws contains a statute, which defines “person” or incorporates a definition of “person.” (See RTC §§ 7329, 8606, 30010, 32002 (incorporating the definition of person from Bus. & Prof. Code, § 23008), 40004, 41003, 43006, 45006, 46020, 50102 (incorporating the definition of person from Health & Saf. Code, § 25299.25, which incorporates the definition of person from Health & Saf. Code, § 25281), 55002, and 60008.) The special tax and fee laws also contain RTC sections 7657.1, 8879, 30284, 32257, 40104, 41098, 43159, 45157, 46158, 50112.5, 55045, and 60210, which authorize the Board to grant a person relief under certain circumstances (hereafter, collectively referred to as the authorizing statutes).

Currently, under subdivision (a) of the authorizing statutes, if the Board finds that a person's failure to make a timely return or payment is due to the person's reasonable reliance on written advice from the Board, the person may be relieved of special taxes and fees and any penalties or interest added thereto. Currently, under subdivision (b) of the authorizing statutes, a person's failure to make a timely return or payment is due to reasonable reliance on written advice from the Board only if the Board finds that:

- The person submitted a written request to the Board for advice about whether a particular activity or transaction is subject to a special tax or fee and fully described the specific facts and circumstances of the activity or transaction in the request;
- The Board responded to the written request for advice in writing and stated whether or not the described activity or transaction is subject to the special tax or fee, or stated the conditions under which the activity or transaction is subject to the special tax or fee; and
- The special tax or fee liability due to the failure to make a timely return or payment applied to a particular activity or transaction which occurred before the Board rescinded or modified the written advice or the Board's earlier written advice ceased to be valid due to a change in the law.

Also, currently, subdivision (d) of the authorizing statutes generally provides that "[o]nly the person making the written request shall be entitled to rely on the [B]oard's written advice to that person."

Regulation 4902 implements, interprets, and makes specific the provisions of the authorizing statutes. As relevant here:

- Regulation 4902, subdivision (b)(1), currently requires that a representative's written request for advice identify the specific person for whom the advice is requested in order for the identified person to rely on the advice in the Board's written response to the representative for relief;
- Regulation 4902, subdivision (c) currently applies to audits, states that the "[p]resentation of [a] person's books and records for examination by an auditor shall be deemed to be a written request for the audit report," and prescribes the circumstances under which an audit report may be relied upon for relief; and
- Regulation 4902, subdivision (a), currently provides that "[w]ritten advice from the Board which was received during a prior audit of the person under the conditions set forth in subdivision (c) below, may be relied upon by the person audited or by a legal or statutory successor to that person."

Also, as relevant here, subdivision (e) of Regulation 4902 explains the circumstances under which a trade or industry association may request written advice on behalf of its members so that the members can rely on the written advice for relief. Subdivision (e) currently provides that:

A trade or industry association requesting advice on behalf of its member(s) must identify and include the specific member name(s) for whom the advice is requested for relief from liability under this regulation.

As a result, a person cannot generally obtain relief by relying on written advice the Board gave to another person, even if their activities or transactions are similar. However, Regulation 4902 does currently allow a person to obtain relief by relying on written advice the Board gave to the person's representative or trade or industry association under specified circumstances.

#### Effect, Objective, and Benefits of the Proposed Amendments to Regulation 4902

##### *Need for Clarification*

The Board's Property and Special Taxes Department's (PSTD's) special taxes and fees divisions are responsible for administering the Board's special tax and fee programs under the special tax and fee laws. Prior to the Board's adoption of Regulation 4902, the Board had adopted Regulations 1124, *Relief from Liability*, 1248, *Relief from Liability*, 1335, *Relief of Liability*, 1422, *Relief from Liability*, 2250, *Relief of Liability*, 2432, *Relief from Liability*, and 2570, *Relief from Liability*, which are applicable to relief under the authorizing statutes in the Motor Vehicle Fuel Tax Law, the Underground Storage Tank Maintenance Fee Law, the Use Fuel Tax Law, the Diesel Fuel Tax Law, the Oil Spill Response, Prevention, and Administration Fees Law, the Emergency Telephone Users Surcharge Act, and Alcoholic Beverage Tax Law, respectively. On February 5, 2003, the Board adopted Regulation 4902 to provide a single, detailed regulation with relief guidelines for all the special tax and fee programs administered by the Board's PSTD, under the special tax and fee laws. Regulation 4902 was specifically developed to mirror the relief provisions in Regulation 1705, *Relief From Liability*, because Regulation 1705 implements, interprets, and make specific RTC section 6596, which is substantially similar to the authorizing statutes. And, Regulation 4902 incorporates all of Regulation 1705's previous amendments made through February 5, 2003, including the 1999 amendments to Regulation 1705 extending relief to trade or industry association members when an association requests written advice on their behalf.

On February 5, 2003, the Board also adopted amendments to Regulations 1124, 1248, 1335, 1422, 2250, 2432, and 2570, which refer to the relief guidelines described in Regulation 4902. And, the Board adopted Regulations 2303, 3021, 3302, 3502, and 4105, which are all called “Relief from Liability” or “Relief From Liability,” to provide specific regulations under the authorizing statutes in the Energy Resources Surcharge Law, the Hazardous Substances Tax Law, the Integrated Waste Management Fee Law, the Fee Collection Procedures Law, and the Cigarette and Tobacco Products Tax Law, respectively, that also refer to the relief guidelines in Regulation 4902.

During its October 23-25, 2012, Board meeting, the Board conducted a hearing regarding a sales and use tax appeal filed by a business entity (hereafter referred to as ABC). During the hearing, ABC indicated that it followed written advice provided during the Board’s prior audit of another business entity (hereafter referred to as XYZ). ABC stated that ownership of XYZ was similar to ABC, and that the two companies engaged in the same type of business in the same industry and shared a common accounting department. Also, records indicated that XYZ and ABC were related entities because XYZ owned more than 50 percent of ABC. Therefore, during the hearing, ABC argued that written advice provided to XYZ during its prior audit was indirectly provided to ABC as well, and that ABC should be permitted to rely on the written advice for relief under RTC section 6596. In response to ABC’s arguments, the Board referred the issue of whether relief from sales and use tax liabilities, under RTC section 6596, should only be available to the person who actually received the written advice from the Board or that person’s legal or statutory successor under certain circumstances, such as those presented in ABC’s appeal, to the Board’s Business Tax Committee (BTC) for further development.

At its August 13, 2013, BTC Meeting, the Board voted to propose amendments to Regulation 1705 to extend relief, under RTC section 6596, to a person who relies on advice provided in a prior audit of a person with shared accounting and common ownership because the Board determined that the amendments are reasonably necessary to have the effect and accomplish the objective of addressing the issue presented by the facts of ABC’s appeal. During the same BTC meeting, the Board also recognized that there might be another issue if there are similar regulations to Regulation 1705 that apply to the special tax and fee programs and the other regulations are not amended to conform to the amendments to Regulation 1705. Therefore, the Board directed staff to recommend conforming amendments to any special tax and fee regulations that are similar to Regulation 1705. As a result, staff determined that Regulation 4902 was the only special tax and fee regulation that was similar to Regulation 1705 and staff drafted amendments to Regulation 4902 to

incorporate the language contained in the proposed amendments to Regulation 1705, in order to ensure that the Board's programs are administered in a uniform manner.

*December 17, 2013, BTC Meeting*

Board staff subsequently prepared Formal Issue Paper 13-011, which recommended that the Board propose to add language to the end of the first sentence in Regulation 4902, subdivision (c), to clarify that the presentation of a person's books and records for examination by an auditor shall be deemed to be a written request for the audit report "by the audited person and any person with shared accounting and common ownership with the audited person." The formal issue paper recommended that the Board propose to add the following language to the end of Regulation 4902, subdivision (c), to clearly prescribe the circumstances under which a person has shared accounting and common ownership with an audited person and require that a person have shared accounting and common ownership with an audited person during the periods that the person is entitled to rely on the audited person's audit report for relief:

For the purposes of this section a person is considered to have shared accounting and common ownership if the person:

- (1) Is engaged in the same line of business as the audited person,
- (2) Has common verifiable controlling ownership of 50% or greater ownership or a common majority shareholder with the audited person, and
- (3) Shares centralized accounting functions with the audited person. The audited person routinely follows the same business practices that are followed by each entity involved. Evidence that may indicate sharing of centralized accounting functions includes, but is not limited to, the following:
  - (A) Quantifiable control of the accounting practices of each business by the common ownership or management that dictates office policies for accounting and tax return preparation.
  - (B) Shared accounting staff or an outside firm who maintains books and records and prepares returns for tax and fee programs administered under the

Revenue and Taxation Code sections referenced under this regulation.

(C) Shared accounting policies and procedures.

These requirements must be established as existing during the periods for which relief is sought. A subsequent written notification stating that the advice was not valid at the time it was issued or was subsequently rendered invalid to any party with shared accounting and common ownership, including the audited party, serves as notification to all parties with shared accounting and common ownership, including the audited party, that the prior written advice may not be relied upon as of the notification date.

The formal issue paper also recommended that the Board amend Regulation 4902, subdivision (a), to clarify that written advice provided under the circumstances described in subdivision (c) may be relied upon by the person audited “or a person with shared accounting and common ownership with the audited person” or by a legal or statutory successor to *that person*. And, during the December 17, 2013, BTC meeting, staff also recommended changing “that person” to “those persons” to make the amendments to subdivision (a) grammatically correct and fully consistent with a minor change to the proposed amendments to Regulation 1705 that staff would subsequently request and the Board would subsequently authorize later that same day.

Therefore, at the conclusion of the Board’s discussion of Formal Issue Paper 13-011 during the December 17, 2013, BTC meeting, the Board Members unanimously voted to propose the amendments to Regulation 4902 recommended in the formal issue paper with the minor change recommended by staff. The Board determined that the proposed conforming amendments to Regulation 4902 are reasonably necessary to have the effect and accomplish the objective of addressing the issue presented by the amendments to Regulation 1705 (discussed above). (The Board also subsequently adopted the proposed amendments to Regulation 1705 on January 16, 2014, with the minor change authorized on December 17, 2013.)

The Board anticipates that the proposed amendments to Regulation 4902 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that relief, under the authorizing statutes, can apply to a person who the Board would reasonably expect to rely on written advice provided by Board staff in a prior audit of another related person because the two persons are:

- In the same industry;
- Under common ownership; and
- Share accounting functions and accounting staff.

The Board has performed an evaluation of whether the proposed amendments to Regulation 4902 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 4902 is the only regulation prov[id]ing guidelines for relief under the authorizing statutes, and the proposed amendments make Regulation 4902 consistent with the amendments to Regulation 1705 discussed above. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation [4902] or the proposed amendments to Regulation [4902].<sup>1</sup>

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<sup>1</sup> The Board previously determined that that there are no comparable federal regulations or statutes to Regulation 4902 or the proposed amendments to Regulation 4902. However, due to a typographical error, the informative digest included in the notice of proposed regulatory action referred to Regulation “1705,” instead of Regulation “4902,” and the typographical error has been corrected in the updated informative digest.